Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

THAN TUN, M.D., AND THIDA SWE TUN,
Petitioners,
vs.
KAUIKEOLANI CHILDREN'S HOSPITAL,
a Hawaii nonprofit corporation, now
known as KAPIOLANI WOMEN AND CHILDREN'S
MEDICAL CENTER, a Hawaii nonprofit
corporation, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF HAWAII

BRIEF IN OPPOSITION OF RESPONDENTS KAUIKEOLANI CHILDREN'S HOSPITAL, KAPIOLANI WOMEN'S AND CHILDREN'S MEDICAL CENTER RICHARD DAVI, PAUL E. COOK, DR. WALTON K.T. SHIM, AND DR. STANLEY M.K. CHUNG

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Paul E. Cook, Dr. Walton K.T. Shim,
and Dr. Stanley M.K. Chung

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QUESTIONS PRESENTED

1. Whether the issues regarding alleged violations of federal antitrust laws and 42 U.S.C. §1983 are improperly raised before this Court.

2. Whether the Hawaii Supreme Court's ruling regarding the issue of due process rests on independent and adequate state grounds.

3. Whether the Hawaii Supreme Court's ruling regarding the issue of exhaustion of administrative remedies rests on independent and adequate state grounds.

4. Whether the Hawaii Supreme Courts's ruling regarding the issue of Children's Hospital, et al.'s immunity rests on independent and adequate state grounds.

5. Whether Dr. Tun waived his claims of improper suspension and denial of privileges.

LIST OF PARTIES

Petitioners are THAN TUN, M.D. and THIDA SWE TUN.

Respondents are KAUIKEOLANI CHILDREN'S HOSPITAL, a Hawaii nonprofit corporation, now known as KAPIOLANI WOMEN'S AND CHILDREN'S MEDICAL CENTER, a Hawaii nonprofit corporation; KAPIOLANI WOMEN'S AND CHILDREN'S MEDICAL CENTER; RICHARD DAVI, Individually and as President of Kapiolani Women's and Children's Medical Center; PAUL E. COOK, Individually and as Executive Vice President of Kapiolani Women's and Children's Medical Center; WALTON K.T. SHIM, M.D., Individually and as Chief of Staff of Kapiolani Women's and Children's Medical Center; STANLEY M.K. CHUNG, M.D., Individually and as Chief of Surgery of Kapiolani Women's and Children's Medical Center; THE QUEEN'S MEDICAL CENTER, A Hawaii nonprofit corporation; JON PEGG, M.D., Individually and as Chairman of Anesthesiology Credentials Committee, The Queen's Medical Center; DAN YOSHIOKA, M.D., Individually and as Chief of Anesthesia, and as a member of the Anesthesiology Credentials Committee, The Queen's Medical Center; and ARTHUR SPRAGUE, M.D., Individually and as a member of the Anesthesiology Credentials Committee, The Queen's Medical Center.

Petitioners' Petition for Writ of Certiorari states that Mitsuo Hattori, M.D. is not a respondent herein.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i
LIST OF PARTIES i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED 2
I. STATEMENT OF THE CASE 2
A. PROCEDURAL HISTORY OF THE CASE 2
B. STATEMENT OF FACTS 3
II. REASONS FOR DENYING THE PETITION 7
A. THE ISSUES REGARDING ALLEGED VIOLATIONS OF 42 U.S.C. §1983 AND FEDERAL ANTITRUST STATUTES ARE NOT PROPERLY BEFORE THIS COURT. 7
B. THE HAWAII SUPREME COURT'S RULING REGARDING THE ISSUE OF DUE PROCESS RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS AND IS BASED ON THE APPLICATION OF STATE LAW TO THE PARTICULAR FACTS IN THIS CASE. 9
C. THE HAWAII SUPREME COURT'S RULING REGARDING THE ISSUE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS AND IS BASED ON THE APPLICATION OF STATE LAW TO THE PARTICULAR FACTS IN THIS CASE. 11
D. THE HAWAII SUPREME COURT'S RULING REGARDING THE ISSUE OF CHILDREN'S HOSPITAL, ET AL.'S IMMUNITY RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS AND IS BASED ON THE APPLICATION OF STATE LAW TO THE PARTICULAR FACTS IN THIS CASE. 15
E. DR. TUN WAIVED HIS CLAIMS OF IMPROPER SUSPENSION AND DENIAL OF PRIVILEGES. ... 20

PAGE

III. CONCLUSION 23

APPENDIX (In Separate Volume)

Supreme Court of Hawaii Memorandum Opinion (Appendix A) A-1

Judgment on Appeal (Appendix B) B-1

HAWAII CONSTITUTION Art. I §4 (Appendix C) C-1

HAWAII REVISED STATUTES §663-1.7 (Appendix D) D-1

Rule 56, Hawaii Rules of Civil Procedure (Appendix E) . E-1

Rule 28, Hawaii Rules of Appellate Procedure (Appendix F) F-1

Excerpts from attachments to Children's Hospital, et al.'s Motion for Summary Judgment (Appendix G) G-1

Silver v. Castle Memorial Hospital, 53 Haw. 475, 497 P.2d 564 (1972), *cert. denied*, 409 U.S. 1048 (1972), *reh. denied*, 409 U.S. 1131 (1973) (Appendix H) H-1

TABLE OF AUTHORITIES

CASES **PAGE**

Adler v. Montefiore Hospital Association of Western Pennsylvania, 311 A.2d 634, 645 (Pa. 1973) 13
Aku v. Lewis, 52 Haw. 366, 371, 477 P.2d 162 (1970) 16
Bartschi v. Chico Community Memorial Hospital, 187 Cal. Rptr. 61, 64 (Cal. App. 1982) 12
Beck v. Washington, 369 U.S. 541 (1962) 7
Campbell v. St. Mary's Hospital, 252 N.W.2d 581, 586, 587 (Minn. 1977) 16
City of Eastlake v. Forest City Enterprises, 426 U.S. 668, 671 n.2 (1976) 7
Costa v. Able Distributors, Inc., 3 Haw. App. 486, 489, 653 P.2d 101, 104 (1982) 19
Delta Air Lines, Inc. v. August, 450 U.S. 346, 362 (1981) .. 7
Eidelson v. Archer, 645 P.2d 171, 179, 181, 183 (Alaska, 1982) 11,12,13
Enterprise Irrigation District v. Farmers Mutual Canal Company, 243 U.S. 157, 164 (1917) 9
First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289 (1968) 15
Garrow v. Elizabeth General Hospital and Dispensary, 401 A.2d 533, 538 (N.J. 1979) 12
Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 686 (1975) 13,15
Hammond v. Johnston, 142 U.S. 73, 78 (1891) 9
Heath v. Alabama, 106 S.Ct. 433, 436 (1985) 7
Hui Malama Aina O Ko'olau v. Pacarro, 4 Haw. App. 304, 313, 666 P.2d 177, 183 (1983) 19
Illinois v. Gates, 462 U.S. 213, 222 (1983) 7
Jackson v. Fulton DeKalb Hospital Authority, 423 F.Supp. 1000, 1004 (N.D. Ga 1976) 20,21
Jankovich v. Indiana Toll Road Comission, 379 U.S. 487, 489 (1965) 9
Medeiros v. Kondo, 55 Haw. 499, 505, 522 P.2d 1269, 1272 (1974) 16
Michigan v. Long, 463 U.S. 1032, 1040-41, 1043 (1983) ... 11
Miller v. Indiana Hospital, 419 A.2d 1191, 1193 (Pa. Super. 1980) 13

PAGE

N.L.R.B. v. Hendricks County Rural Electric Corp., 454 U.S. 170, 176 n.8 (1981) 11,13,15
Paine v. Brunswick County Hospital Authority, 470 F.Supp. 28, 32 (E.D. N.C. 1978) 20
Runnels v. Okamoto, 56 Haw. 1, 5-6, 525 P.2d 1125, 1129 (1974) 16,18
Russell v. American Guild of Variety Artists, 53 Haw. 456, 463, n.4, 497 P.2d 40, 45 n.4 (1972) 16
Silver v. Castle Memorial Hospital, 53 Haw. 475, 497 P.2d 564 (1972), *cert. denied*, 409 U.S. 1048 (1972), *reh. denied*, 409 U.S. 1131 (1973) 9,11
Southern Power Company v. North Carolina Public Service Company, 245 U.S. 440, 441 (1917) 11,13,15
Towse v. State, 64 Haw. 624, 632-33, 637, 647 P.2d 696, 703, 705 (1982) 16
Yarnell v. Sisters of St. Francis Health Services, Inc., 446 N.E.2d 359, 363 (Ind. App. 1983) 11

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES 2,9,10,11
Fifth Amendment 2,9
Fourteenth Amendment 2,9,10
CONSTITUTION OF THE STATE OF HAWAII 2,9,11
Art.I §4 2,11

RULES

FEDERAL RULES OF CIVIL PROCEDURE
Rule 56(f) 13
HAWAII RULES OF APPELLATE PROCEDURE
Rule 28 2
Rule 28(b)(4) 8
HAWAII RULES OF CIVIL PROCEDURE
Rule 56 2
Rule 56(e) 19
Rule 56(f) 13

STATUTES

United States Code
28 U.S.C. §1257(3) 2

42 U.S.C. §1983 3,7,8,9
Hawaii Revised Statutes
§663-1.7 2,15,17,18
§663-1.7(a) 15,17
§663-1.7(b) 15,16
§663-1.7(c) 15,18,19,20
§663-1.7(d) 20

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BRIEF IN OPPOSITION OF RESPONDENTS KAUIKEOLANI CHILDREN'S HOSPITAL, KAPIOLANI WOMEN'S AND CHILDREN'S MEDICAL CENTER RICHARD DAVI, PAUL E. COOK, DR. WALTON K.T. SHIM, AND DR. STANLEY M.K. CHUNG

Respondents Kauikeolani Children's Hospital, Kapiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walton K.T. Shim, and Dr. Stanley M.K. Chung respectfully request that this Court deny the Petition for Writ of Certiorari, which seeks review of the Hawaii Supreme Court's opinion in this case.

OPINIONS BELOW

The unpublished Memorandum Opinion of the Supreme Court of Hawaii, filed on June 17, 1986, is printed as Appendix A hereto. The Judgment on Appeal, entered on August 16, 1986, is printed as Appendix B.

JURISDICTION

This Court does not have jurisdiction to grant a Writ of Certiorari under 28 U.S.C. §1257(3). (*See* "II. Reasons for Denying the Petition" below).

CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED

This case involves Hawaii Constitution Art. 1 §4, Hawaii Revised Statutes §663-1.7, Rule 56 of the Hawaii Rules of Civil Procedure, and Rule 28 of the Hawaii Rules of Appellate Procedure, copies of which are printed as Appendices C, D, E, and F, respectively.

I. STATEMENT OF THE CASE

This Brief in Opposition is submitted on behalf of Respondents Kauikeolani Children's Hospital, Kapiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walton K.T. Shim, and Dr. Stanley M.K. Chung (hereinafter collectively referred to as "Children's Hospital, et al.").

A. PROCEDURAL HISTORY OF THE CASE

On August 13, 1984, Petitioners Dr. Than Tun and Thida Swe Tun filed a Complaint in the Circuit Court of the First Circuit, State of Hawaii. (R.1). On August 22, 1985, Petitioners filed an Amended Complaint against Respondents Kauikeolani Children's Hospital (hereinafter "Children's Hospital"), Kapiolani Women's and Children's Medical Center, Richard Davi, Paul E. Cook, Dr. Walton K.T. Shim (erroneously identified in the Amended Complaint and in the Hawaii Supreme Court's Memorandum Opinion as Walter K.T. Shim), Dr. Stanley M.K. Chung (all hereinafter referred to collectively as "Children's Hospital, et al."), and Dr. Mitsuo Hattori. (R.25). Also named as defendants were The Queen's Medical Center, Dr. Jon Pegg, Dr. Dan Yoshioka, and Dr. Arthur Sprague (hereinafter collectively referred to as "Queen's Medical Center, et al."). (R.25). ("R." and "2R." refer to volumes 1 and 2, respectively, of the Record on Appeal before the Hawaii Supreme Court).

The Amended Complaint is extremely confusing and often repetitious in setting forth the legal theories against Children's Hospital, et al. However, the theories appear to be as follows: Libel, slander and defamation (Counts I, IV, V); Improper revocation of privileges (apparently referring to the procedures required by the By-Laws) (Count I); Violation of due process under the Hawaii State Constitution and the United States Constitution (5th and 14th amendments),

(Count I) and of 42 U.S.C. §1983 (*see* Count XI); Conspiracy to deprive Dr. Tun of his constitutional rights (Count III), and conspiracy to restrict interstate business (Count X); Intentional infliction of emotional distress (Counts VII, VIII); Malicious prosecution and abuse of process (Count XII); Breach of contract (Count XIII) and tortious breach of contract (XIV); Negligence (Count XV); Unfair and deceptive trade practices (Count VI); Loss of consortium (Count XVI); Promissory estoppel (Count XVII); and allegations that acts were intentional (Count II), malicious, wanton and willful (Count XVIII). (*See* R.25-48).

On October 10, 1984, Queen's Medical Center, et al. filed a Motion to Dismiss Complaint for Failure to State a Claim Upon Which Relief Can Be Granted. (R.71). An order granting the motion and a judgment were filed on December 7, 1984. (R.160, 164).

On January 8, 1985, a motion for summary judgent was filed on behalf of Children's Hospital, et al. (R.184). Dr. Mitsuo Hattori joined in the motion. (R.315). On January 25, 1985, Dr. Tun filed a Memorandum in Opposition to Motion for Summary Judgment. (R.335). At a hearing on February 19, 1985, the Honorable Edwin H. Honda granted the motion for summary judgment. (Tr.22-23). An Order Granting Motion for Summary Judgment and Directing Entry of Final Judgment and a Judgment were filed on March 6, 1985. (R.373, 375). An Amended Order Granting Motion for Summary Judgment and Directing Entry of Final Judgment and an Amended Judgment were filed on April 2, 1985. (2R.13, 16).

Dr. Tun appealed to the Hawaii Supreme Court. In a Memorandum Opinion filed on June 17, 1986, the Hawaii Supreme Court affirmed the judgments in favor of Respondents Children's Hospital, et al. and Queen's Hospital, et al. and reversed and remanded for further proceedings against Dr. Mitsuo Hattori, who is not a respondent herein. (A copy of the Memorandum Opinion is printed as Appendix A). Dr. Tun and Dr. Hattori each filed motions for reconsideration. By order filed on July 7, 1986, the Hawaii Supreme Court denied Dr. Tun's and Dr. Hattori's motions for reconsideration. Pursuant to the Memorandum Opinion, a Judgment on Appeal was entered on August 19, 1986. (A copy of the Judgment on Appeal is printed as Appendix B).

B. STATEMENT OF FACTS

1. STATUS OF RESPONDENTS CHILDREN'S HOSPITAL, ET AL.

The status of Respondents Children's Hospital, et al. at the time of the facts in this case was as follows:

Kauikeolani Children's Hospital (now known as Kapiolani Women's and Children's Medical Center, hereinafter "Children's Hospital"). This institution was identified in the pleadings as being one of the hospitals involved in this case.

Kapiolani Women's and Chidren's Medical Center was not in existence as an entity at the time of the facts in this case and is not identified anywhere in the records of this case.

Richard Davi was the president of "Children's Hospital".

Paul E. Cook was the vice-president of "Children's Hospital".

Dr. Walton K.T. Shim was Chief-of-Staff at "Children's Hospital".

Dr. Stanley M.K. Chung was Chief of Surgery at "Children's Hospital". (*See* R.184, pp. 45-55)

2. **SUMMARY OF FACTS**

Briefly, the following facts form the basis of this entire case: Dr. Tun applied for anesthesiology privileges at Children's Hospital; "Temporary Privileges" with certain restrictions were granted in June, 1982; the temporary privileges were revoked in July, 1982; and his application for privileges was also denied in July, 1982. All of Dr. Tun's claims against Children's Hospital, Mr. Davi, Mr. Cook, Dr. Shim and Dr. Chung arise out of the granting and then suspension of temporary privileges for anesthesia and the rejection of Dr. Tun's application for privileges. (*See* the Chronology of Events, affidavits of Richard Davi, Paul Cook, Dr. Stanley Chung, Dr. Walton Shim, and Exhibits A through S, which were attached to Children's Hospital, et al.'s Motion for Summary Judgment (R. 184, et seq.), and which are printed as Appendix G (hereinafter "App. G")). A more detailed factual summary follows:

Dr. Tun submitted his application for privileges in anesthesiology at Children's Hospital on June 15, 1982. (App. G, Exhibit D.) On June 23, 1982, Dr. Tun was informed that temporary privileges had been granted, effective immediately, except for "newborn anesthesia and cardiovascular anesthesia" which were not granted, pending documentation of training and experience in those areas. (App.G, Exhibit E.) Dr. Tun had previously applied for privileges on April 15, 1977 (App.G, Exhibit A), which were granted on a probationary basis on October 6, 1977 (App. G, Exhibit B), but Dr. Tun did not utilize these privileges and they are not involved in this lawsuit.

Dr. Tun's application for privileges and the granting of temporary privileges were all done pursuant to Articles V and VI of the By-Laws. (App. G, Exhibit C.) On July 2, 1982, the Surgical Executive Committee met and approved the granting of temporary privileges to Dr. Tun. (App. G, Exhibit H.) This action was pursuant to and was required by Article V, Section 2.C of the By-Laws.

Since the temporary privileges granted to Dr. Tun had restrictions regarding "newborn and cardiovascular anesthesia" (App. G, Exhibit E) which were not granted, pending documentation of training and experience, Dr. Tun was observed on two occasions on July 3, and two on July 7, 1982 in the operating room while he administered anesthesia to children-patients. (App. G, Exhibit H.) Dr. Hattori, an anesthesiologist (Chief of Anesthesiology), observed Dr. Tun on the two procedures on July 7, 1982. (App. G, Exhibit E.) Dr. Hattori recommended that Dr. Tun "should not be doing any pediatric cases in this hospital unless he seeks further training elsewhere." (App. G, Exhibit H). On July 9, 1982, Dr. Stanley Chung, as Chief of Surgery, wrote to Mr. Davi, as president, recommending that Dr. Tun's temporary privileges be terminated based on Dr. Hattori's observation. (App. G, Exhibit J.) Based on these recommendations, Mr. Paul Cook, as executive vice president for Mr. Davi, as president, wrote to Dr. Tun on July 9, 1982, advising him that his temporary privileges in anesthesiology had been terminated, and that Dr. Tun had the right to appeal under Article VII, Section 2 of the By-Laws. (App. G, Exhibit I.) Mr. Cook's action was authorized by Article VII, Section 2 of the By-Laws. (App. G, Exhibit C.)

On July 13, 1982, the Credentials Committee met regarding Dr. Tun's application for privileges and agreed to recommend to the Medical Executive Committee that privileges not be granted. (App. G, Exhibit K.) This meeting was required by Article V, Section 2.B of the By-Laws. (App. G, Exhibit C.) On July 27, 1982, the Medical Executive Committee met and affirmed the recommendation of the Credentials Committee and denied Dr. Tun's application for privileges. (App. G, Exhibit L.) The Medical Executive Committee's actions were also required and authorized by Article V, Section 2.C of the By-Laws. (App. G, Exhibit C.)

On July 28, 1982, Dr. Tun was notified of the Medical Executive Committee's decision by a letter from Mr. Cook. (App. G, Exhibit M.) Dr. Tun was also notified of his appeal rights pursuant to Articles V and VIII of the By-Laws.

On August 1, 1982, Dr. Tun wrote to "Children's Hospital", acknowledging the July 28, 1982 letter, and stated that

> I have sufficient work in other hospitals, that I don't find it necessary to avail myself of your hospitals, at this point of time.

(App. G, Exhibit N.)

On September 30, 1982, Dr. Tun was informed that the Board of Trustees, upon recommendation of the Medical Executive Committee, rejected his application for medical staff membership, which action was taken after receipt of Dr. Tun's August 13, 1982 letter in which he "waived your right to a hearing following notification of the Medical Executive Committee's recommendations." (App. G, Exhibit O.) The Board of Trustee's action was required and authorized by Article V, Section 2.C of the By-Laws, which requires that an adverse recommendation of the Medical Executive Committee be forwarded to the Board of Trustees either after the applicant has exercised his right of appeal (for hearing by an Ad Hoc Committee of the Medical Staff pursuant to Article VIII, Section 1.A) or he has waived his right to a hearing. In this case, it was assumed that Dr. Tun had waived his right to a hearing by his August 13, 1982 letter, but also no appeal was taken by Dr. Tun.

On October 14, 1982, Mr. Canlas, the attorney for Dr. Tun, wrote to Children's Hospital, stating that Dr. Tun never waived his right to a hearing in his August 13, 1982 letter and that since there was no waiver of a right to a hearing, Dr. Tun merely had not pursued his application for privileges at the hospital. (App. G, Exhibit P.) In paragraph 25 of the Amended Complaint it is claimed that on or about August 13, 1982, Dr. Tun "withdrew his application for privileges." Thus, Dr. Tun's position seems to be that he did not waive his right to an appeal but merely withdrew his application.

On October 20, 1982, Dr. Hattori, as Chief of Anesthesiology at Children's Hospital, provided Queen's Medical Center with a form questionnaire that had been submitted by Queen's regarding Dr. Tun (App. G, Chronology), in which he stated that Dr. Tun was not "ready to give anesthesia for children unless he seeks further training in the field of pediatric anesthesiology."

On December 20, 1982, Children's Hospital wrote to Dr. Tun, advising him that he was entitled to an appellate review by the Board of Trustees and that he had fifteen days to appeal. (App. G, Exhibit Q.) Dr. Tun did not avail himself of this right to appeal. (App. G, Affidavit of Richard Davi.)

II. REASONS FOR DENYING THE PETITION

This case presents no substantial federal question for this Court. The issues regarding alleged violations of federal antitrust laws and and 42 U.S.C. §1983 are not properly before this Court. The Hawaii Supreme Court's rulings regarding the issues of due process, exhaustion of administrative remedies, and Children's Hospital, et al.'s immunity rest on independent and adequate state grounds and are based on the application of state law to the particular facts in this case. Furthermore, Dr. Tun waived his claims of improper suspension and denial of privileges. There are adequate nonfederal grounds for affirming summary judgment as to Children's Hospital, et al.

A. THE ISSUES REGARDING ALLEGED VIOLATIONS OF 42 U.S.C. §1983 AND FEDERAL ANTITRUST STATUTES ARE NOT PROPERLY BEFORE THIS COURT.

Petitioners appear to attempting to establish the existence of a federal question by contending that the conduct of Children's Hospital, et al. was in violation of 42 U.S.C. §1983 and federal antitrust statutes.

This Court has held that issues which were not pressed or passed upon below were not properly before this Court. Pursuant to the "not pressed or passed upon below" rule, this Court has declined to consider issues not properly raised in the lower courts. *Heath v. Alabama*, 106 S. Ct. 433, 436 (1985); *Illinois v. Gates*, 462 U.S. 213, 222 (1983); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362, (1981); *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668, 671 n.2 (1976).

In *Beck v. Washington*, 369 U.S. 541 (1962), petitioner was indicted by a grand jury. Prior to trial, petitioner unsuccessfully attempted to have the indictment set aside. Petitioner was convicted of grand larceny in a state trial court. The state supreme court affirmed the conviction. This Court also affirmed.

On appeal to this Court, petitioner contended that a state statute permitting persons in custody to challenge grand jurors denied equal protection to persons not in custody who are investigated by grand juries. This Court held that the contention was not properly before this Court for the following reasons: (1) Petitioner did not mention the statute or make the equal protection argument at the trial court level when petitioner attacked the indictment, even though it was then apparent that the prosecutor and the trial court viewed petitioner as

outside the scope of the statute; (2) On appeal to the state supreme court, petitioner did not list the contention as an "assignment of error" although the state Rules on Appeal provided that the state supreme court would not consider an alleged error of the trial court "unless the same be definitely pointed out in the 'assignments of error' in appellant's brief"; (3) On appeal to the state supreme court, Petitioner did not argue the contention in his brief, as opposed to merely setting it forth as he did in one sentence of his brief; (4) Petitioner did not make the contention at all in his petitions for rehearing filed after the state supreme court agreed with the trial court's interpretation of the statute to exclude petitioner; (5) Although the opinions of the state supreme court discussed the interpretation of the statute, neither considered the statute in the light of the equal protection argument; (6) The contention was not within the scope of the questions to which the writ of certiorari in the case was specifically limited.

Petitioners herein are pressing the federal antitrust and §1983 issues for the first time in their petition for certiorari. This Court should decline to consider the alleged violations of §1983 and federal antitrust laws because these issues were not pressed and passed upon below. Petitioners' First Amended Complaint alleged violations of "antitrust provisions under federal and state law" without citing any specific statutes (Count X), and also alleged violation of 42 U.S.C. §1983 (Count XI). However, Petitioners did not press these claims in the Circuit Court or Hawaii Supreme Court. Although Children's Hospital, et al.'s Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment encompassed all of the Counts of the Amended Complaint, Petitioners did not raise any opposition on the antitrust or §1983 issues. In granting Children's Hospital, et al.'s Motion for Summary Judgment, the Circuit Court did not specifically rule on the issues of antitrust law and 42 U.S.C. §1983.

On appeal to the Hawaii Supreme Court, Petitioner's Opening Brief did not list the antitrust or §1983 issues in the Statement of Points of Error. Rule 28(b)(4) of the Hawaii Rules of Appellate Procedure (which is printed as Appendix F) provides that points not included in the Statement of Points of Error "will be disregarded, except that the court, at its option, may notice a plain error not presented." Petitioners' Opening Brief did not cite or discuss the antitrust issue. Nor does the Opening Brief discuss the §1983 issue; in

an unrelated discussion of the issue of exhaustion of administrative remedies, the Opening Brief cites a case that involved §1983. The Hawaii Supreme Court's Memorandum Opinion did not specifically rule on the antitrust or §1983 issues. Petitioners' motion for reconsideration of the Hawaii Supreme Court's decision did not raise the antitrust or §1983 issues. This Court should not consider the alleged violations of 42 U.S.C. §1983 and federal antitrust laws, as these issues are not properly before this Court.

B. THE HAWAII SUPREME COURT'S RULING REGARDING THE ISSUE OF DUE PROCESS RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS AND IS BASED ON THE APPLICATION OF STATE LAW TO THE PARTICULAR FACTS IN THIS CASE.

The due process contentions in the Petition for Writ of Certiorari cite the Fourteenth Amendment to the United States Constitution, as well as the Hawaii Supreme Court's decision in *Silver v. Castle Memorial Hospital*, 53 Haw. 475, 497 P.2d 564 (1972), *cert. denied*, 409 U.S. 1048 (1972), *reh. denied*, 409 U.S. 1131 (1973) (hereinafter "*Silver*"; printed as Appendix H). However, the Hawaii Supreme Court's ruling on the due process issue in this case relied solely on *Silver*. In addition, although Petitioners' First Amended Complaint alleged violations of both the Hawaii Constitution (without specifying which provision) and the Fifth and Fourteenth Amendments to the United States Constitution (Count I), Petitioners did not present any due process arguments in opposition to Children's Hospital, et al.'s Motion for Summary Judgment and did not cite or rely on the Federal Constitution in their appeal to the Hawaii Supreme Court.

Where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, this Court has no jurisdiction if the nonfederal ground is independent of the federal ground and adequate to support the judgment. *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 489 (1965); *Enterprise Irrigation District v. Farmers Mutual Canal Company*, 243 U.S. 157, 164 (1917); *Hammond v. Johnston*, 142 U.S. 73, 78 (1891).

In *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, this Court reviewed a case in which both federal and state constitutional issues had been raised. In that case, after a city's airport zoning ordinance was passed, respondents had constructed a toll road parallel to a municipal airport. Petitioners, who operated the airport,

brought an action for injunctive relief and damages, alleging that the toll road was constructed in violation of the ordinance. The trial court refused to grant an injunction but awarded petitioners damages. The state supreme court reversed on the grounds that the ordinance "purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation."

This Court initially granted certiorari because it appeared that the case involved the validity of airport zoning regulations under the Fourteenth Amendment of the United States Constitution and presented important questions not previously considered by this Court. However, after considering the state supreme court's decision, this Court dismissed the writ of certiorari as improvidently granted. This Court held that the state supreme court's decision was supported by an independent and adequate state ground.

Examining the decision of the state supreme court, this Court noted that the state supreme court stated the issue for decision as whether the ordinance purported to effect a taking of private property for public use in violation of the state constitution and the Federal Constitution. This Court also noted that in resolving the issues, the state supreme court (1) considered the effect of the state and Federal constitutions separately rather than analyzing them together, (2) quoted from both the state and Federal constitutions, and (3) cited its own state decisions, decisions from other states, and federal decisions. This Court said:

> [N]othing in the [state supreme court's] opinion suggests that its conclusion [as to the first question] flows from a federal rather that a state source. Indeed, the organization and language of the opinion indicates that, at the least, state law is an equal ground of decision. . . . [T]here is no intimation that the [state supreme court's] conclusion [as to the second question] is based less forcefully on the [state constitution] than on the [Federal Constitution].
>
> In such circumstances, even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment. . . . Under our settled decisions the state ground in this case must be regarded as an independent and adequate ground of decision, and we so hold. (citations omitted)

379 U.S. at 491-93.

In the instant case, the Hawaii Supreme Court's discussion of the due process issue cites only *Silver*. The Memorandum Opinion does not cite any other Hawaii case or cases from other states or any federal decisions. It does not cite the United States or Hawaii Constitutions. (*See* Hawaii Constitution Art. I §4, printed as Appendix C).

Silver established as law in Hawaii that a physician whose hospital privileges are being revoked or who is being denied appointment or reappointment to the medical staff must be afforded procedural due process, including notice and a hearing. This Court declined to review the decision in *Silver*. 409 U.S. 1048; 409 U.S. 1131. The opinion in *Silver* cites both federal and state cases; state law appears to be at least an equal ground of the *Silver* decision. In the instant case, the Hawaii Supreme Court's reliance solely on *Silver* indicates that the ruling regarding due process in this case rests on independent and adequate state grounds. *Cf. Michigan v. Long*, 463 U.S. 1032, 1040-41, 1043 (1983).

In addition, the due process issue in this case does not concern the validity of *Silver*, but rather, involves the application of *Silver* to the particular facts in this case. *N.L.R.B. v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981); *Southern Power Company v. North Carolina Public Service Company*, 245 U.S. 440, 441 (1917). The Hawaii Supreme Court considered the record in this case and determined that Children's Hospital, et al. had met the due process requirements of *Silver*, so that summary judgment was properly granted.

C. THE HAWAII SUPREME COURT'S RULING REGARDING THE ISSUE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS AND IS BASED ON THE APPLICATION OF STATE LAW TO THE PARTICULAR FACTS IN THIS CASE.

The Hawaii Supreme Court properly rejected Dr. Tun's contention that his failure to exhaust his administrative remedies at Children's Hospital was excused because he felt that pursuing any administrative remedy would have been futile.

A physician who has been denied staff privileges at a hospital must first exhaust his administrative remedies before availing himself of the judicial process. *Yarnell v. Sisters of St. Francis Health Services, Inc.*, 446 N.E.2d 359, 363 (Ind. App. 1983); *Eidelson v.*

Archer, 645 P.2d 171, 179 (Alaska 1982); *Garrow v. Elizabeth General Hospital and Dispensary*, 401 A.2d 533, 538 (N.J. 1979). The exhaustion of remedies requirement has been excused where the administrative review process is inadequate or would be futile to the certainty of an adverse decision. *Eidelson v. Archer*, 645 P.2d at 181.

In *Eidelson v. Archer*, 645 P.d 171 and *Bartschi v. Chico Community Memorial Hospital*, 187 Cal. Rptr. 61 (Cal App. 1982), plaintiff physicians failed to exhaust their administrative remedies after denial or suspension of staff privileges. In both cases, it was held that the hospitals were entitled to summary judgment on the grounds that the physicians' failure to exhaust their administrative remedies was not excused.

In *Eidelson v. Archer*, 645 P.2d 171, plaintiff physician was notified in writing that his hospital privileges were summarily suspended and that he had a right to a hearing under the hospital bylaws. Plaintiff requested a hearing, then rescinded the request. The executive committee of the hospital medical staff supported the summary suspension. Plaintiff did not request a hearing on the summary suspension, but filed an action in court against members of the hospital medical staff. Plaintiff declined to appear before the executive committee regarding the investigation. The executive committee voted to permanently suspend plaintiff's hospital privileges. Plaintiff did not request a hearing on the permanent suspension, although he was advised of his right to do so.

Plaintiff brought an action for damages. The state supreme court held that summary judgment should have been granted to defendants because plaintiff failed to exhaust his administrative remedies. The court concluded that the exhaustion of remedies doctrine was applicable to plaintiff's action. The court rejected the plaintiff's argument that his failure to pursue the hospital's remedies was excused because any appeal that could have been taken pursuant to the bylaws would have been futile. The court said:

> In this case, since [plaintiff] did not seek an administrative hearing, we are necessarily forced to speculate as to what would have happened if plaintiff had exercised his right of appeal.
>
> . . . .
>
> Under the bylaws, plaintiff was given an adequate opportunity to appeal his suspension and to present any claims of bias or impartiality. He chose instead to bypass those procedures in order to seek judicial relief. We conclude that [plaintiff] has failed to

> demonstrate that the executive committee was prejudiced against him or that any resort to the appeal process was futile. In short, plaintiff has failed to establish any adequate justification for his failure to exhaust the hopital's remedies. (citations omitted)

645 P.2d at 181, 183.

In the instant case, the Hawaii Supreme Court applied the principles set forth in *Eidelson v. Archer*, 645 P.2d 171, to the facts appearing in the record and determined that Dr. Tun's failure to exhaust the administrative review process at Children's Hospital was not justified. *N.L.R.B. v. Hendricks County Rural Electric Corp.*, 454 U.S. at 176 n.8; *Southern Power Company v. North Carolina Public Service Company*, 245 U.S. at 441. The record before the Hawaii Supreme Court was adequate for the Hawaii Supreme Court to make such a determination. *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 686 (1975). Dr. Tun had ample time, but did not even attempt, to conduct discovery between the time the First Amended Complaint was filed and the filing of Children's Hospital, et al.'s Motion for Summary Judgment. Nor did Dr. Tun oppose Children's Hospital, et al.'s Motion for Summary Judgment with an affidavit pursuant to Rule 56(f) of the Hawaii Rules of Civil Procedure (printed as Appendix E; virtually identical to rule 56(f) of the Federal Rules of Civil Procedure). It was not until Dr. Tun's appeal to the Hawaii Supreme Court that he first claimed that he needed to conduct discovery.

The record in this case shows that from the time Children's Hospital received Dr. Tun's application, it followed the By-Laws and offered Dr. Tun all opportunities of a hearing or appeal that were provided for in the By-Laws, and Dr. Tun never requested a hearing or an appeal. The By-laws of Children's Hospital (App. G, Exhibit C) provide a specific procedure for the processing of an application for staff privileges. Dr. Tun, in his application for appointment to the medical staff (App. G, Exhibit D), agreed to abide by the terms of the By-Laws. The staff by-laws of a hospital constitute the terms of a legally binding contract between the hospital and the doctors on its staff. *Miller v. Indiana Hospital*, 419 A.2d 1191, 1193 (Pa. Super. 1980); *Adler v. Montefiore Hospital Association of Western Pennsylvania*, 311 A.2d 634, 645 (Pa. 1973).

The letter of July 9, 1982, which informed Dr. Tun that his privileges were summarily suspended, also advised him of his right to a hearing pursuant to Article VIII, Section 2 of the By-Laws. (*See*

App. G, Exhibit I.) Dr. Tun failed to request a hearing on the summary suspension of his privileges as he was entitled to do.

Dr. Tun was also promptly advised of his rights to a hearing and an appeal at every stage of consideration of his application for privileges. On July 28, 1982, Dr. Tun was notified that the Medical Executive Committee decided to recommend to the Board of Trustees that Dr. Tun's application be rejected and that he again had a right to request a hearing on the Medical Executive Committee's recommendation pursuant to Article V, Section 2 and Article VIII of the By-Laws. (App. G, Exhibit M.) Again, Dr. Tun failed to request a hearing as he was entitled to.

Instead, on August 13, 1982, Dr. Tun wrote a letter which stated that "I don't find it necessary to avail myself of your facilities at this time." (App. G, Exhibit N.) Dr. Tun now claims that this amounted to a withdrawal of his application, rather than a waiver of his right to appeal. (*See* paragraph 25 of the Amended Complaint (R.25).

The Medical Executive Committee's recommendation was then forwarded to the Board of Trustees. On September 29, 1982, Dr. Tun was informed that the Board of Trustees accepted this recommendation. (App. G, Exhibit O.) This action by the Board of Trustees was required and authorized by Article V, Section 2 of the By-Laws, which requires an adverse decision of the Medical Executive Committee to be forwarded to the Board of Trustees.

On December 20, 1982, Children's Hospital again advised Dr. Tun of his right to appeal, stating that the Board would withdraw its prior decisions if Dr. Tun would appeal within fifteen days. (App. G, Exhibit Q.) Dr. Tun did not avail himself of this opportunity to appeal.

Thus, in summary, Dr. Tun was given numerous opportunities to appeal (1) the decision of the summary suspension of his temporary privileges by Mr. Cook's letter of July 9, 1982; (2) the Medical Executive Committee's decision of which Dr. Tun was notified on July 28, 1982; and (3) the decision of the Board of Trustees, of which Dr. Tun was notified on September 29, 1982. Finally, Dr. Tun was again advised of the opportunity to appeal based on the Board of Trustees' December 20, 1982 offer to withdraw its prior decision and allow Dr. Tun to appeal. Dr. Tun failed to appeal from these decisions even though he had a right to do so. The Hawaii Supreme Court pointed out that if Dr. Tun had requested a hearing or appeal, he would have had an opportunity to present his claims of bias and his

version of the incidents in question. There was an adequate factual basis for the Hawaii Supreme Court's ruling that Dr. Tun's failure to pursue his administrative remedies provided in the By-Laws barred him from bringing the action.

D. THE HAWAII SUPREME COURT'S RULING REGARDING THE ISSUE OF CHILDREN'S HOSPITAL, ET AL.'S IMMUNITY RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS AND IS BASED ON THE APPLICATION OF STATE LAW TO THE PARTICULAR FACTS IN THIS CASE.

The Hawaii Supreme Court considered the facts appearing in the record of this case and properly concluded that under Hawaii Revised Statutes §663-1.7 (printed as Appendix D), Children's Hospital, et al. are immune from the civil liabilities claimed by Petitioners. *N.L.R.B. v. Hendricks County Rural Electric Corp.*, 454 U.S. at 176 n.8; *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. at 686; *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289-90 (1968); *Southern Power Company v. North Carolina Public Service Company*, 245 U.S. at 441.

1. CHILDREN'S HOSPITAL, ET AL. ARE IMMUNE FROM DR. TUN'S CLAIMS PURSUANT TO H.R.S. §663-1.7.

H.R.S. §663-1.7 provides immunity for Children's Hospital, et al. Drs. Chung and Shim are immune from Dr. Tun's claims pursuant to H.R.S. §663-1.7(a) and (b). Children's Hospital, Mr. Davi, and Mr. Cook are immune from Dr. Tun's claims pursuant to H.R.S. §663-1.7(c).

Drs. Chung and Shim are immune from Dr. Tun's claims pursuant to H.R.S. §663-1.7(a) and (b). §663-1.7(a) defines "peer review committee" to mean

> A committee created by a professional society, or by the medical staff of a licensed hospital, whose function is to maintain the professional standards established by the bylaws of the society or the hospital of the persons engaged in its profession or occupation, or in its hospital.

§663-1.7(b) provides immunity for a member of a peer review committee, in the absence of malice. §663-1.7(b) states:

> There shall be no civil liability for any member of a peer review committee for any acts done in furtherance of the purpose for which the committee was established; provided that:

(1) The member was authorized to perform in the manner in which he did; and

(2) The member acted without malice after having made a reasonable effort to ascertain the truth of the facts upon which he acted.

In effect, §663-1.7(b) confers a qualified privilege on members of a peer review committee. *Aku v. Lewis*, 52 Haw. 366, 371, 477 P.2d 162, 166 (1970). In the context of qualified privilege, the test of "malice" is the reasonableness of a defendant's actions. *Towse v. State*, 64 Haw. 624, 632-33, 647 P.2d 696, 703 (1982), quoting *Russell v. American Guild of Variety Artists*, 53 Haw. 456, 463 n.4, 497 P.2d 40, 45 n.4 (1972).

Where a defendant acts under a claim of qualified privilege, the plaintiff has the burden of adducing clear and convincing proof that defendant was motivated by malice and not by an otherwise proper purpose. *Runnels v. Okamoto*, 56 Haw. 1, 5-6, 525 P.2d 1125, 1129 (1974); *Medeiros v. Kondo*, 55 Haw. 499, 505, 522 P.2d 1269, 1272 (1974). Summary judgment will be granted where the issue of malice is removed from the case by uncontroverted affidavits and depositions, and the moving party is entitled to judgment as a matter of law. *Runnels v. Okamoto*, 56 Haw. at 6, 525 P.2d at 1129.

Summary judgment as to the issue of malice has been held appropriate in an action brought by a physician whose hospital staff privileges were terminated. In *Campbell v. St. Mary's Hospital*, 252 N.W.2d 581 (Minn. 1977), the court affirmed summary judgment in favor of defendants hospital and Surgical Board, which had terminated plaintiff physician's surgical privileges. The court held that plaintiff had failed to establish malice and thus, under a state statute, individual members of the hospital review board were immune from liability. The court said:

> We are unconvinced from a review of plaintiff's affidavits and the evidence most favorable to his claims that his broad allegations of malice are anything more than unsubstantiated speculation as to the reasons for the revocation of his surgical privileges.

252 N.W.2d at 587.

In the instant case, the Hawaii Supreme Court properly determined that the action of Children's Hospital, et al. in relying on the Chief of Surgery's recommendation comported with the procedure set down in the by-laws. The Court pointed out that if Dr. Tun had requested a hearing, he would have had the opportunity to present evidence and witnesses regarding the accuracy and truth of Dr.

Hattori's report.

The record shows that the actions of Drs. Shim and Chung were authorized by the By-Laws and were reasonable under the circumstances of this case. The actions of Drs. Shim and Chung were based on the observation by Dr. Hattori of two procedures performed by Dr. Tun on July 7, 1982. The entire process of reviewing Dr. Tun's qualifications for privileges in anesthesiology was authorized by the By-Laws. Dr. Tun's temporary privileges were granted pursuant to Article VI of the By-Laws, and he was advised on June 23, 1982 that he had been granted "Temporary Privileges", not including newborn anesthesia and cardiovascular anesthesia, pending receipt of documentation of training and experience in those areas (*see* App. G, Exhibit E). Dr. Tun was provided with Surgical Observer information sheets so that he could be observed in the operating room by qualified members of the hospital staff to document his qualifications for full privileges. Dr. Hattori was "observing" Dr. Tun on July 7, 1982 and as a result of these observations he came to the conclusion that Dr. Tun's temporary privileges should be suspended. Drs. Chung and Shim were members of the Medical Executive Committee. (App. G, Affidavits of Drs. Chung and Shim.) This committee is a peer review committee under H.R.S. §663-1.7(a), and thus Drs. Chung and Shim are entitled to the immunity afforded by H.R.S. §663-1.7 unless they acted with malice.

Dr. Chung's actions were reasonable under the circumstances and were taken in compliance with the By-Laws. Dr. Chung is not an anesthesiologist. Dr. Chung states in his affidavit that after he received an oral report and recommendation from Dr. Hattori, who is an anesthesiologist, about Dr. Tun, he wrote a letter to Mr. Davi, recommending that Dr. Tun's temporary privileges be revoked. The By-Laws provide that clinical privileges may be summarily suspended without a hearing "where it is determined that the life or health of . . . patients would be endangered by continued treatment by the practitioner" and "whenever action must be taken immediately in the best interest of the patient care in the hospital." (By-Laws, Art. VI.2.E and VIII.2.A.) Under Art. VII.2.B of the By-Laws, a physician whose clinical privileges have been summarily suspended is entitled to request a hearing. The record shows that Dr. Tun was advised of his right to a hearing in the same letter that informed him that his temporary clinical privileges were summarily suspended. (App. G, Exhibit I.) If Dr. Tun had requested a hearing,

there would have been an investigation, and Dr. Tun would have had a chance to present his version of the incidents in question. The record shows that Dr. Chung acted in compliance with the By-Laws and without malice. *Runnels v. Okamoto*, 56 Haw. at 6, 525 P.2d at 1129. Dr. Chung is immune from Dr. Tun's claims pursuant to H.R.S. §663-1.7.

Similarly, Dr. Shim is also immune from Dr. Tun's claims pursuant to H.R.S. §663-1.7. Dr. Shim's actions as a member of the Credentials Committee and as Chairman of the Medical Executive Committee, which both recommended rejection of Dr. Tun's application, were taken in compliance with the By-Laws. Dr. Shim, who is not an anesthesiologist, states in his affidavit that the actions of the committees were based on the observations and reports of Dr. Hattori, who is an anesthesiologist. Dr. Shim acted without malice and in the best interest of the safety and welfare of the patients at the hospital. Dr. Tun was repeatedly advised of his right to request a hearing. A hearing would have allowed Dr. Tun to present his version of the incidents, but he failed to request a hearing. Petitioners have the burden of adducing clear and convincing proof that Drs. Shim and Chung were motivated by malice and not by an otherwise proper purpose. *Runnels v. Okamoto*, 56 Haw. at 5-6, 525 P.2d at 1129. In the absence of such proof, summary judgment was properly granted in favor of Drs. Shim and Chung.

Children's Hospital, Mr. Davi, and Mr. Cook are immune from Dr. Tun's claims pursuant to H.R.S. §663-1.7(c), which provides that there shall be no civil liability for a hospital

> in communicating any conclusions reached by one of its peer review committees relating to the conformance with professional standards of any person engaged in the profession or occupation of which the membership of the communicating professional society consists, to a peer review committee of another professional society society whose membership is comprised of persons engaged in the same profession or occupation, or to a duly constituted governmental board or commission or authority having as one of its duties the licensing of persons engaged in that same profession or to a government agency charged with the reponsibility for administering a program of medical assistance in which services are provided by private practitioners.

Mr. Davi and Mr. Cook are not physicians and were not members of the peer review committees at Children's Hospital that made the

decisions to suspend Dr. Tun's temporary privileges and to deny Dr. Tun's application for privileges. Mr. Davi and Mr. Cook simply wrote to Dr. Tun, in compliance with the By-Laws, informing him of the decisions made and advising him of his right to a hearing and an appeal. They simply communicated the conclusions reached by the peer review committees. (*See* App. G, Affidavits of Richard Davi and Paul Cook.) Absent a specific showing of facts to the contrary, summary judgment was properly granted in favor of Children's Hospital, Mr. Davi and Mr. Cook. H.R.C.P., Rule 56(e); *Hui Malama 0 Ko'olau v. Pacarro*, 4 Haw. App. 304, 313, 666 P.2d 177, 183 (1983); *Costa v. Able Distributors Inc.*, 3 Haw. App. 486, 489, 653 P.2d 101, 104 (1982).

Finally, while it is not clear from the Amended Complaint, Dr. Tun may also base some of his libel and slander allegations on the fact that on October 20, 1982, Dr. Hattori as Chief of Anesthesiology sent a form questionnaire relating to Dr. Tun to Queen's. (*See* R.184, Exhibit T.) Dr. Hattori had said that he was not an employee of Children's Hospital (*see* R.184, Affidavit of Dr. Mitsuo Hattori, Exhibit W), but even if he were, this act would be privileged under H.R.S. §663-1.7(c), which affords immunity to a hospital in communicating conclusions reached by peer review committees. Drs. Shim and Chung and Mr. Davi and Mr. Cook were not involved in this communication.

2. **DR. TUN SPECIFICALLY RELEASED CHILDREN'S HOSPITAL, ET AL. FROM LIABILITY IN HIS APPLICATION.**

Dr. Tun, in his application (App. G, Exhibit D) agreed to release all representatives of Children's Hospital and its Medical/Dental staff for acts performed in good faith and without malice in connection with evaluating his application and credentials and qualifications. The specific provision in the application states:

> I hereby release Kauikeolani Children's Hospital and any individual or organization from liability arising out of or relating to the disclosure of such information or to any action taken by them or their agents in good faith and without malice, in connection with my appointment of the staff or renewal of my staff privileges.

As to Dr. Tun's allegations which may be based on the fact that on October 20, 1982, Dr. Hattori sent a filled-in questionnaire regarding Dr. Tun to Queen's Medical Center (R.184, Exhibit T), this com-

munication was privileged pursuant to §663-1.7(c), as discussed above. However, Dr. Tun, in his application, also specifically authorized the release of information by Children's Hospital to other hospitals regarding Dr. Tun's professional competency. (App. G, Exhibit D.) Additionally, Dr. Tun signed a second authorization for release of information at Queen's Medical Center. (R.184, Exhibit U.) Thus, Dr. Tun himself, on two occasions, signed documents authorizing the release of the information which he now complains was libelous, etc. Children's Hospital, et al. were really not involved in this transmittal, but if they were, then they are protected by the above-described authorizations.

3. **CHILDREN'S HOSPITAL, ET AL. WERE UNDER A STATUTORY DUTY TO REPORT IN WRITING ANY ADVERSE DECISION REGARDING PRIVILEGES PURSUANT TO H.R.S. §663-1.7(d) AND THEREFORE HAVE NO LIABILITY TO PETITIONERS FOR REPORTING TO THE BOARD OF MEDICAL EXAMINERS.**

Petitioners apparently base their claim, in part, on the fact that some Respondents communicated the decision of the Medical Executive Committee and/or Board of Trustees to deny Dr. Tun's application to the Board of Medical Examiners. It is not clear who is supposed to have made this report, but in any event, there is a statutory duty to make such a report pursuant to H.R.S. §663-1.7(d). §663-1.7(d) states, in part:

> The highest level peer review committee of a medical society, hospital, or other health care institution shall report in writing every adverse decision made by it to the board of medical examiners within thirty days after the adverse decision is verified by the committee.

E. **DR. TUN WAIVED HIS CLAIMS OF IMPROPER SUSPENSION AND DENIAL OF PRIVILEGES.**

A physician who fails to pursue the administrative process provided by a hospital's bylaws will be deemed to have waived his claim for wrongful suspension or denial of privileges. *Jackson v. Fulton-DeKalb Hospital Authority*, 423 F.Supp. 1000 (N.D. Ga. 1976); *Paine v. Brunswick County Hospital Authority*, 470 F.Supp. 28 (E.D. N.C. 1978).

In *Paine v. Brunswick County Hospital Authority*, 470 F.Supp. 28, plaintiff physician's temporary staff privileges were revoked.

Plaintiff was then notified that her application for privileges was going to be denied and that a hearing was set regarding her privileges. Prior to the hearing date, plaintiff wrote to the hospital that she was formally withdrawing her application for permanent staff privileges at the hospital and was also withdrawing her request for a hearing. The court held that

> [a]s [plaintiff] was notified of the matter pending and chose for herself to withdraw her application and hearing request and not appear and contest, due process requirements have been met.

470 F.Supp. at 32.

In *Jackson v. Fulton-DeKalb Hospital Authority*, 423 F.Supp. 1000, plaintiff physician's surgical privileges at a hospital were suspended. Plaintiff's attorney attended one hearing before the executive committee and part of a second hearing; plaintiff did not attend either hearing. Plaintiff was notified that the executive committee sustained the suspension of plaintiff's surgical privileges and voted to suspend all of plaintiff's medical staff privileges. Plaintiff did not appeal, although he was entitled to. Plaintiff filed an action against the hospital and its officials. Summary judgment for defendants was affirmed. The court held that the physician was not denied due process and said:

> [P]laintiff contends that in any event, his failure to file an appeal should not constitute a waiver of his constitutional rights. . . . In the instant case, however, the plaintiff did not even attend the meeting at which the case was discussed. Plaintiff's lawyer left while the meeting was still in progress but gave no indication that he was in any way protesting the form of the hearing.

423 F.Supp. at 1004.

The record shows that Dr.Tun was repeatedly advised of his right to a hearing or an appeal. On July 9, 1982, Dr. Tun was notified that his temporary privileges in anesthesiology were suspended and that he had a right to request a hearing pursuant to the By-Laws. (App. G, Exhibit I.) On July 28, 1982, Dr. Tun was notified of the Medical Executive Committee's recommendation that his application for staff privileges be denied and was advised that he had a right to request a hearing pursuant to the By-Laws. (App. G, Exhibit M.) On September 30, 1982, Dr. Tun was notified that the Board of Trustees had rejected his application for medical staff membership. (App. G, Exhibit 0.) On December 20, 1982, Dr. Tun was advised that he was entitled to an appellate review by the Board of Trustees and that he

had fifteen days to appeal. (App. G, Exhibit Q.)

It is also evident from the record that, despite notification at each stage of the process, Dr. Tun never requested a hearing or appeal. Dr. Tun apparently claims that his letter of August 13, 1982 amounted to a withdrawal of his application for privileges. (*See* paragraph 25 of the Amended Complaint R.25; App. G, Exhibit N). Dr. Tun's August 13, 1982 letter (App. G, Exhibit N) in no way states that he is withdrawing his application. However, even if it did, all of the decisions except that of the Board of Trustees had already been made by August 13, 1982. The By-Laws (Article V, Section 2) provided that a recommendation of the Medical Executive Committee shall be sent to the Board of Trustees for ratification or rejection. This was a mandatory procedure. Dr. Tun agreed to abide by the By-Laws, and by withdrawing his application (if he in fact did withdraw his application), he cannot prevent the Board of Trustees from performing the duty it was required to perform pursuant to the By-Laws.

Dr. Tun apparently did not intend to appeal any of the decisions made by Mr. Davi as president to suspend Tun's temporary privileges, and the Medical Executive Committee's decisions to recommend to the Board of Trustees to reject Tun's application for privileges. Dr. Tun's attempted withdrawal of his application is merely another way of saying he did not intend to appeal any of these decisions, which he had a right to do under the By-Laws. Whether Dr. Tun withdrew his application, or he decided not to appeal, the fact is that he rejected the administrative avenues offered by Children's Hospital. Dr. Tun has waived his claims of improper suspension and improper denial of privileges.

III. CONCLUSION

This case presents no substantial federal question before this Court. The Hawaii Supreme Court's decision affirming summary judgment as to Children's Hospital, et al. rests on independent and adequate state grounds.

For the foregoing reasons, it is respectfully requested that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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